91-1128

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No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1991

CHARLES F. RIVES, II,
Marv A. Seurer; Ronald D. Pester,
Tom Hampleman; R.D. Griffin;
John A. Cameron; Marv Slusser;
and Gene Dudley,
Petitioners,
v.
INTERSTATE COMMERCE COMMISSION,
United States of America,
Respondents.

UNION PACIFIC MOTOR FREIGHT COMPANY,
Intervenor.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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DATE: November 15, 1991

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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 89-9530

Charles F. RIVES, II; Marv A. Seurer; Ronald D. Pester; Tom Hampleman; R.D. Griffin; John A. Cameron; Marv Slusser; Gene Dudley,
Petitioners,
v.
INTERSTATE COMMERCE COMMISSION: United States of America,
Respondents.

Union Pacific Motor Freight Company,
Intervenor.

June 6, 1991

Before LOGAN and MOORE, Circuit Judges, and GREENE, District Judge.*

LOGAN, Circuit Judge.

Eight former employees of the Union Pacific Motor Freight Company (petitioners) appeal a decision of the Interstate Commerce Commission

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*The Honorable J. Thomas Greene, United States District Judge for the district of Utah, sitting by designation.

(ICC) denying them labor protective conditions following consolidation of three major railroads. Petitioners contend that the ICC erred in determining that they were not entitled to mandatory labor protection under 49 U.S.C. §11347, and, alternatively, in failing to exercise its discretion to award labor protection benefits under 49 U.S.C. §11344.

This appeal arises out of the consolidation of three western railroads, the Union Pacific Railroad Company, the Missouri Pacific Railroad Company, and the Western Pacific Railroad Company, under the Union Pacific name. The ICC approved the consolidation pursuant to 49 U.S.C. §11343. Union Pac. Corp., 366 I.C.C. 459 (1982), aff'd sub nom. Southern Pac. Trans.

Co. v. ICC, 736 F.2d 708 (D.C.Cir. 1984), cert. denied, 469 U.S. 1208, 105 S.Ct. 1171, 84 L.Ed.2d 322 (1985). In conjunction therewith, the ICC approved Union Pacific's acquisition of Missouri Pacific's and Western Pacific's motor carrier subsidiaries. Union Pacific's motor carrier, the Union Pacific Motor Freight Company (UPMF), continued under the control of Union Pacific.

Petitioners were employees of UPMF at the time of the consolidation. UPMF, as Union Pacific's wholly-owned motor carrier subsidiary, was responsible for ramping and deramping trailers and containers to and from rail cars. Petitioners performed these ramping and deramping operations using "piggy packers", equipment capable of transporting the trailers and

containers to and from staging areas. UPMF had ICC authority to perform regular trucking services, but was limited to auxiliary and supplemental rail service.

Pursuant to 49 U.S.C. §11347, the ICC imposed New York Dock labor protective conditions to protect railraod employees affected by the consolidation.[1/] Petitioners, who were terminated following the consolidation, were denied New York Dock conditions, the ICC holding that petitioners were not entitled because they were not railroad employees. McPherson v. Union Pac. Motor Freight Co., I.C.C. Dec., Fin.

[1/] These conditions were fashioned by the ICC in New York Dock Ry., 360 I.C.C. 60 (1979), Aff'd sub nom., New York Dock Ry. v. Uited States, 609 F.2d 83 (2d Cir. 1979), and include such benefits as displacement or dismissal allowances and continuation of benefits for a specified period.

Dkt. No. 30000, Sub-NO. 45 (McPherson) (Order of April 3, 1987). The ICC later reopened the proceeding to consider further evidence on whether petitioners were entitled to the New York Dock conditions it had imposed for the benefit of others or, alternatively, whether the ICC should use is discretionary authority to impose additional conditions for petitioners' benefit.[2/] The ICC again denied petitioners relief, stating

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[2/] The ICC reopened the proceedings at the request of Union Pacific. Before this request, seven former UPMF employees from Kansas City filed a petition for review with the Eighth Circuit, and seven former UPMF employees from Denver filed a petition for review with this court. The two cases were later consolidated and set for review by the Eighth Circuit. The case was transferred back to this court, however, apparently because six of the Kansas City petitioners, all who resided in the Eighth Circuit, entered into a settlement agreement with Union Pacific.

that its refusal to exercise its discretionary authority was because petitioners had failed to present any evidence or arguments in favor of the ICC exercising its discretion. McPherson, (Order of April 12, 1989).

I

On appeal, petitioners first argue that the ICC erred in finding that they were not within the class of employees protected by the New York Dock conditions imposed for the benefit of those directly employed by the parent railroads. They contend that the ICC's decision, based solely on the identity of the employer, ignores the intent of employee protective conditions and goes against commission and court precedent. The ICC asserts that its decision is consistent with the

Supreme Court's holding in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 1094 S.Ct. 2778, 81 L.Ed2d 694 (1984), and that it acted with due deference to prior commission and court cases.

The statute governing labor protective conditions states, in pertinent part:

> "When a rail carrier is involved in a transaction for which approval is sought under sections 11344 and 11345 or section 11346 of this title, the Interstate Commerce Commission shall require the carrier to provide a fair arrangement at least as protective of the interest of employees who are affected by the transaction as the terms imposed under this section before February 5, 1976, and the terms established under section 405 of the Rail Passenger Service Act (45 U.S.C. 565)."

49 U.S.C. §11347. In the instant case, the ICC construed §11347's

mandatory protections as applying only to those "directly employed by a rail carrier," and, therefore, petitioners, "who were employed by non-rail subsidiaries of the rail carrier" were excluded. McPherson (Order of April 12, 1989, at 3).

When reviewing an agency's construction of a statute it administers, a court must follow a two-step analysis. First, if Congress has directly spoken to the precise question at issue and its intent is clear, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Chevron, 467 U.S. at 842-43, 104 S.Ct. at 2781-82. If Congress has not addressed directly the precise question at issue, the reviewing court "does not simply

impose its own construction on the statute... . Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." Id. at 843, 104 S.Ct. at 2782 (footnote omitted). In such a case, the agency's construction is permissible unless it is "arbitrary, capricious, or manifestly contrary to the statute." Id. at 844, 104 S.Ct. at 2782.

A

Applying the first step in the Chevron analysis, we are satisfied that Congress has not unambiguously expressed an intent that employees of a motor carrier subsidiary are entitled to the mandatory protections afforded in §11347.

Although §11347 requires protection for "employees who are affected by" an approved consolidation, the term "employees" is not defined in the Interstate Commerce Act, and we believe, from the words used, it is unclear whether Congress intended to include just those employed directly by the rail carrier or, more broadly, to include at least some employees of noncarrier subsidiary corporations whose jobs might be affected.

The legislative and statutory history of §11347 does not clear up this ambiguity. The ICC argues that the committee reports accompanying §11347, and the language from §11347's predecessor, 49 U.S.C. §5(2)(f), demonstrate Congress' intent that only those directly employed by a rail carrier are

entitled to mandatory protection. The ICC points to the fact that §5(2)(f) used the phrase "railroad employees", directing the ICC to "require a fair and equitable arrangement to protect the interests of the railroad employees affected." 49 U.S.C. §5(2)(f) (repealed 1978). It also notes that the committee reports accompanying §11347 state that §5(2)(f) was recodified for "clarity" and that it was not intended to change the substance of the statute. See H.R.Rep. No. 1395, 95th Cong., 2d Sess. 8, 166, reprinted in 1978 U.S.Code Cong. & Admin.News 3009, 3016, 3175. We are not persuaded. Like §11347, §5(2)(f) did not define "railroad employees." Nowhere in the pre-1978 Act or the legislative history accompanying §11347 is the phrase

"railroad employees" defined; Congress simply never addressed the issue presented in this case.

Two other circuits have considered the issue with opposite results. In Cosby v. ICC, 741 F.2d 1077 (8th Cir. 1984), cert. denied, 471 U.S. 1110, 105 S.Ct. 2344, 85 L.Ed.2d 861 (1985), the court held that employees of an exclusive auxiliary-to-rail motor carrier were "employees" within the meaning of the Act because the motor carrier was "intimately tied to the railroad's main transportation function." Id. at 1081. In contrast, the court in Kansas City Southern Indus., Inc. v. ICC, 902 F.2d 423 (5th Cir. 1990), held that former §5(2)(f) and the reports accompanying the 1978 recodification indicated clearly Congress' intent

that §11347 did "not mandate labor protective conditions for employees of motor carrier subsidiaries of a merging railroad." Id. at 438. Of course, this court is not bound by the decisions of other circuits. We note that Cosby did not discuss the Chevron analysis. We note also that the motor carrier in Kansas City Southern was not restricted to auxiliary-to-rail services and received a majority of its revenues from nonrail-related activities. See Kansas City Southern, 902 F.2d at 438.

B

Because we are satisfied that Congress has not unambiguously expressed its intent, we must decide under the second prong of Chevron whether the ICC's itnerpretation of §11347 is "a permissible

construction of this statute." Chevron, 467 U.S. at 843, 104 S.Ct. at 2782. In making this determination, we are governed by the following standard:

> "Th[e] view of the agency charged with administering the statute is entitled to considerable deference; and to sustain it, we need not find that it is the only permissible construction that [the agency] might have adopted but only that [the agency's] understanding of this very 'complex statute' is a sufficientiy rational one to preclude a court from substituting its judgment for that of [the agency]."

Chemical Mfgrs. Ass'n v. National Resources Defense Council, Inc., 470 U.S. 116, 125, 105 S.Ct. 1102, 1107, 84 L.Ed.2d 90 (1985). See also Young v. Community Nutrition Inst., 476 U.S. 974, 981, 106 S.Ct. 2360, 2364-65, 90 L.Ed.2d 959 (1986).

Bound by this standard, we hold the ICC's interpretation of §11347--that only those directly employed by a rail carrier are entitled to mandatory labor protective conditions--a permissible and rational construction of the statute. The language in former §5(2)(f) mandates protection only for "railroad employees" and the legislative reports accompanying §11347 state that the recodification intended no substantive changes in existing law.[3/] Restricting §11347's

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[3/] The House report states:

> "Substantive change not intended--Like other codifications undertaken to enact into positive law all titles of the United States Code, this bill makes no substantive change in the law. It is sometimes feared that mere changes in terminology and style will result in changes in substance or impair the precedent value of earlier judicial decisions and other interpretations. This fear

mandatory protections to rail carrier employees provides certainty and a logical limit to the scope of employees protected by §11347. Also, a reading as expansive as that petitioners request would render superfluous the ICC's use of discretionary authority under 49

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might have some weight if this were the usual kind of amendatory legislation where it can be inferred that a change of language is intended to change substance. In a codification statute, however, the courts uphold the contrary presumption: the statute is intended to remain substantively unchanged."

H.R.Rep. No. 1395 at 9, reprinted in 1978 U.S. Code Cong. & Admin.News at 3018. In accord with this legislative history we stated, in Atchison, Topeka & Santa Fe Ry. v. Lennen, 732 F.2d 1495 (10th Cir. 1981), that recodification of the Interstate Commerce Act in 1978 "was not intended to change the law" and that any substantive conflicts between the original language and the new language must be resolved "in favor of the original language." Id. at 1497.

U.S.C. §11344 to give labor protection for other employees affected by a consolidation.

Petitioners may be correct that a more rational interpretation of §11347 would focus on the nature of the work performed, not just the identity of the employer.[4/] That does not make the ICC's

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[4/] Petitioners also argue that the ICC's interpretation of §11347 is unreasonable because it has in the past treated a railroad and its subsidiary as a single transportation system. Under this "single system doctrine," the ICC considers that a corporate family comprised of "a single, integrated transportation system, even though it is made up of several separate corporations ... to be, in effect, one carrier." Brotherhood of Ry. & Airline Clerks v. Burlington Northern, Inc., 671 F.2d 1085, 1089 (8th Cir. 1982). Although the ICC has utilized this doctrine in determining that all rail employees of a railroad's subsidiaries were entitled to labor protection, see Pennsylvania R.R. Co., 347 I.C.C. 536, 546-47 (1974), we know of no cases in which the ICC has applied this doctrine to nonrail employees of a motor carrier subsidiary of a railroad.

interpretation unreasonable. And once we have determined that the agency's interpretation is reasonable, we may not disturb it on review. "[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." Chevron, 467 U.S. at 844, 104 S.Ct. at 2782. "The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: "Our Constitution vests such responsibilities in the political branches.'" Id. at 866, 104 S.Ct. at 2793 (citation omitted).[5/]

[5/] Because we hold that the ICC's interpretation of §11347 is reasonable, we need not consider petitioners' argument that the ICC erred in not considering evidence relating to thier job descriptions

II

Finally, petitioners argue that the ICC erred in refusing to award protective conditions under its discretionary authority. This argument centers on 49 U.S.C. §11344(c), which permits the ICC, in its discretion, to provide labor protection for other persons affected by a rail consolidation.[6/]

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and relationships with Union Pacific before making its determination. Under the ICC"s "identity of the employer" standard, such evidence is not relevant in deciding whether petitioners are "railroad employees" entitled to labor protection. Therefore, it does not affect our determination of reasonableness. See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto.Ins., 463 U.S. 29, 43, 103 S.Ct. 2856, 2866-67, 77 L.Ed.2d 443 (1983).

[6/] Section 11344(c) states, in pertinent part:

> "The Commission shall approve and authorize a transaction under this section when it finds the transaction is consistent with the public interest. The Commission may

In the instant case, the ICC expressly refused to consider using its discretion because petitioners failed to present any supporting arguments at the reopening proceeding, despite being invited to do so. See McPherson (Order of April 12, 1989, at 3). The ICC now contends that this failure precludes our consideration of this issue on appeal.

All issues a party contests on appeal must be raised at the appropriate time under the agency practice. United States v. L.A. Tucker Truck Lines, 344 U.S. 33, 37, 73 S.Ct. 67, 69, 97 L.Ed. 54 (1952). Failure of a party to represent its contentions properly to the agency precludes appellate review. New Mexico Envtl. Improvement Div. v.

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impose conditions governing the transaction..."

Thomas, 789 F.2d 825, 835-36 (10th Cir. 1986). A court may not substitute its judgment for that of the agency when "the agency has not had an opportunity to make a factual record or apply its expertise." Id. at 835.

In the instant case, all of the evidence presented by petitioners was directed to whether they were employees within the meaning of §11347. The petitioners' evidence sought to demonstrate the similarities between UPMF employees and Union Pacific employees. Petitioners contend that their employment comparison evidence presented in reference to §11344 was sufficient for the ICC to consider using its discretionary power. We disagree. The ICC reopened the proceedings to reconsider the issue

of employment protective conditions for UPMF employees. The ICC expressly requested evidence and arguments on two issues:

> "The [petitioners]...may present evidence on whether they were railroad employees who qualify for mandatory labor protection under 49 U.S.C. 11347. They may also seek to demonstrate that the Commission should exercise its discretionary authority under 49 U.S.C. 11344(c) to provide protection for motor carrier employees."

McPherson (reopening order of August 10, 1987, at 2). The evidence submitted by petitioners was, in essence, the same as that submitted in the original proceeding when the only issue was whether they were railroad employees under §11347. No separate evidence or argument was directed at the availability of discretionary protection. Petitioners presented no evidence of

financial hardship or a lack of marketable skills, which the ICC might consider relevant in deciding whether to grant discretionary benefits. Petitioners had the burden to present their case to the ICC for consideration and their failure to properly present the issue of discretionary protection to the ICC precludes our review.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 89-9530

CHARLES F. RIVES, II, et al.,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION,
et al.,
Respondents.

ORDER

Filed August 20, 1991

Before HOLLOWAY, Chief Judge, LOGAN, KcKAY, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY and EBEL, Circuit Judges, and GREENE*, District Judge.

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*The Honorable J. Thomas Greene, United States District Judge for the District of Utah, sitting by designation.

This matter comes on for consideration of petitioners' petition for rehearing and suggestion for rehearing en banc in the captioned case.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision sought to be reheard.

In accordance with Rule 35(b) of the Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all the judges of the court in regular active service. No member of the panel and no judge in regular service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

ROBERT L. HOECKER, CLERK

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 30000

UNION PACIFIC CORPORATION,
PACIFIC RAIL SYSTEM, INC. AND
UNION PACIFIC RAILROAD COMPANY -
CONTROL - MISSOURI PACIFIC
CORPORATION AND
MISSOURI PACIFIC RAILROAD COMPANY

Finance Docket No. 30000
(Sub-No. 45)

GARY W. McPHERSON
v.
UNION PACIFIC MOTOR FREIGHT COMPANY,
ET AL.

Decided: April 3, 1987

In Union Pacific - Control - Missouri Pacific; Western Pacific, 366 I.C.C. 459 (1982) (UP/MP/WP), we authorized, inter alia, the Union Pacific Corporation and Union Pacific Railroad and Missouri Pacific Railroad Company (MP), subject to certain conditions including labor protective conditions. For the protection of

carrier employees affected by that transaction, we imposed the conditions specified in New York Dock Ry. - Control - Brooklyn Eastern Dist., 360 I.C.C. 60 (1979) (New York Dock), unless an agreement for employee protection had been entered into, in which case we imposed the specified negotiated level of protection. 366 I.C.C. at 618-622.

In UP/MP/WP, 366 I.C.C. at 654, we also approved the acquisition by UP of a motor carrier subsidiary of MP -- Missouri Pacific Truck Lines, Inc. (MPTL). At the time of the acquisition, UP also controlled, and it continues to control, a motor carrier -- Union Pacific Motor Freight Company (UPMF).

This proceeding involves a number of complaints by employees of

the UP-MP controlled motor carriers. They allege that the protections we mandated have not been effected.

BACKGROUND

1. The Denver complainants. By letter-petition dated November 14, 1985, six former employees of UPMF[1/] contend that they were terminated, effective November 8, 1985, without prior notice, from their jobs at UPMF's TOFC ramp operations at Denver, CO. These employees allege that MPTL now operates the Denver facility and that they lost their jobs as a direct result of the 1982 consolidation of UP and MP. They allege that UPMF should have offered

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[1/] While the initial letter referred to six individuals, argument and evidence was submitted for seven: Marv Slusser, Wheatridge, CO.; Gene Dudley, Denver, CO; John A. Cameron, Erie, CO; Tom Hampleman, Wheatridge, CO; Marv A. Seurer, Wheatridge, CO; R.D. Griffin, Erie, CO; and Ronald D. Pester, Lakewood, CO.

them other jobs, or compensation, as required by the New York Dock conditions imposed in the merger proceeding.

We reopened the merger proceeding in a decision served February 18, 1986, stating that we were treating the letter as a petition for clarification. We directed the employees to file evidence and argument and for UP-MP to reply.

Complainants state that they were employees of UPMF in Denver for at least 22 years and contend that they lost their jobs at the Denver ramp as a direct result of the UP-MP consolidation. They argue that the labor protection provided in New York Dock applies to all employees of UP-MP, including employees of motor carrier subsidiaries of the

railroads, citing Cosby v. I.C.C., 741 F.2d 1077 (8th Cir. 1984).

They base their position on 49 U.S.C. 11347, which provides:

> ...the Interstate Commerce Commission shall require the carrier to provide a fair arrangement at least as protective of the interest of employees who are affected by the transaction as the terms imposed under this section before February 5, 1976, and the terms established under section 565 of Title 45. (Emphasis added by complainants.)

UP-MP, in rebuttal here, states that the complainants were not affected by the consolidation and, even if they were, that the labor protective conditions imposed in the consolidation under 49 U.S.C. 11347 are not applicable to employees of motor carrier subsidiaries of railroads. UP-MP indicates that its motor carrier subsidiaries are completely independent corporate

units. It states that the Denver employees of UPMF were not replaced by MPTL employees but by those of another company that was not related to the UP-MP corporate family. UPMF bid against several other companies on a contract to perform trucking services at the Denver terminal, and lost. UP-MP states that it has sought contracts for many of its terminals and that its UPMF subsidiary has to compete with both corporate affiliates and numerous non-affiliated firms for the railroad's business. It indicates that in some instances UPMF has been able to retain contracts for terminal operations at some locations, but has been unsuccessful at others. Its corporate policy dictates that UP have motor carrier services provided for it at the

lowest possible cost. UP-MP presented evidence to show that UPMF and MPTL are independent entities that must compete with non-affiliated motor carriers if they wish to continue to perform operations for UP.

UP-MP argues that the protections for employees in New York Dock were intended to be restricted to railroad employees and were not intended to cover employees of rail-affiliated motor carriers. Defendant rejects the interpretation given to 49 U.S.C. 11347 by complainants and the court in Cosby. UP-MP argues that the recodified 49 U.S.C. 11347 was never intended to provide labor protection to non-railroad employees, because Congress and the Commission long recognized that the employment skills of motor

carrier employees were much more transferable than those of railroad workers.

UP-MP also contends that the Commission has declined to follow the logic of Cosby, with regard to labor protection for employees of motor carrier subsidiaries. It cites Milwaukee--Acquisition by GTC, _____ I.C.C.2d _____ (1985) (Milwaukee); Norfolk Southern Corp.--Control--North American Van Lines, 1 I.C.C. 2d _____ (1985) (NS/NAVL).

The Railway Labor Executives Association filed a comment on March 17, 1986, indicating that it supported Cosby's apparent determination that employees of motor carrier subsidiaries of railroads are entitled to labor protective conditions. This comment

included a statement by Dean T. Echols, Associate Director, Industry Relations with the Brotherhood of Railway and Airline Clerks. However, in a supplemental comment filed April 1, 1986, RLEA withdrew Mr. Echols' statement.

2. The Kansas City complainants. On May 21, 1986, former employees of UPMF in Kansas City, MO filed a "Petition to Reopen and Request for Enforcement" in the consolidation proceeding.[2/] Petitioners allege that they were all employees of UPMF at the time of the merger of UP and MP and subsequently lost their jobs as a result of the merger. They believe they are

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[2/] These employees are: Louis C. Burris, Gladstone, MO; Larry A. Creiger, Oak Grove, MO; David C. Doleshal, Kansas City, MO; Steve Harter, Kansas City, MO; Raymond May, Kansas City, MO; Charles Payne, Kansas City, KS; and Charles F. Rivers II, Olathe, KS.

entitled to labor protective conditions specified in New York Dock under Cosby.

UP-MP responds to these allegations in much the same manner as it did to the filing by the Denver employees, indicating that the statements of the court in Cosby concerning the automatic application of labor protective conditions to employees of affiliated motor carriers were only dicta and that, subsequent to Cosby, we have rejected that interpretation. UP-MP also reiterates its position that motor carrier employees were never intended to receive the levels of labor protection found in 49 U.S.C. 11347, because the nature of their employment does not require the enhanced level of protection the statute provided for employees

performing railroad work.

3. Gary W. McPherson. In a complaint filed April 25, 1986, Gary W. McPherson alleged that he was an employee of UPMF, that his employment was terminated, and that he was entitled to job protection under 49 U.S.C. 11347.[3/]

On July 17, 1986, UP-MP filed a motion to dismiss this complaint, making the same arguments it made in response to the pleadings of the Denver and Kansas City complainants. Concurrently, UP-MP filed a Petition for Extension of Time in Which to Answer Complaint, requesting that

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[3/] Complainant was offered severance pay of one month for each year of service. It appears that Mr. McPherson was in the process of accepting this offer when he was told that, instead, he would be offered a job as vacation relief in various cities. He apparently refused this position, was terminated, and subsequently filed this complaint.

the due date on their answer be extended until twenty days after the Commission ruled on their motion to dismiss. Complainant replied.[4/] Because of the similarity of issues, we are consolidating all three complaints in this proceeding.

DISCUSSION AND CONCLUSIONS

Logic would dictate that the first question to be answered here must be whether complainants were affected by the merger itself, as such a factual finding is necessary to relief. However, the Commission does not resolve disputes over the applicability of labor protective conditions to individual employees. Complainants have asserted, and UP has contested, that the UP/MP/WP consolidation was the cause of complainants' displacement. This

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[4/] UP-MP has not filed a reply to the McPherson complaint.

factual issue of "causation" (i.e., whether particular employees are "affected" by a Commission-approved transaction or whether adverse consequences to employees were the result of such a transaction) is not for the Commission's determination, but is within the proper province of an arbitrator or the parties' negotiations. See Leavens v. Burlington Northern, Inc., 348 I.C.C. 962, 975, 979 (1977); Walsh v. United States, 723 F.2d 570, 575 (1983); Bell v. Western Maryland Railway Company, 366 I.C.C. 64, 67 (1981). Even when we impose labor protective conditions, we do not resolve these causation issues. Therefore, we will not consider evidence submitted on the question of whether complainants' displacement was a result of the

UP/MP/WP transactions.

Nevertheless, even assuming for purposes of discussion that complainants' job loss was the result of the UP/MP/WP merger, we find that the labor protective conditions imposed in our decision in UP/MP/WP were not for the benefit of complainants. We also see no basis for imposing such protection now.

Complainants' principal claim is that they are entitled to the protections mandated by section 11347, which are reflected in the New York Dock conditions. Their claim of mandatory protection must fail because they were employees of a motor carrier, UPMF, not railroad employees, as former section 5(2)(f) of the Interstate Commerce Act, the predecessor to section 11347,

required, and as we must continue to interpret that provision.[5] Moreover, long-standing precedent holds that the mandatory protection of Section 11347 does not extend even to employees of non-rail subsidiaries of a railroad.[6] Accordingly, there is no requirement in the Interstate Commerce Act that complainants, who are not rail carrier employees, must be protected

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[5] See Milwaukee, slip op. at 16 and NS/NAVL, slip op. at 37, discussing the prohibition on attributing substantive change to the 1978 recodification and citing Cass v. United States, 417 U.S. 72, 82 (1974) and Atchison, Topeka & Santa Fe Railway v. United States, 617 F.2d 485, 490 (7th Cir. 1980).

[6] Pennsylvania Railroad-Merger-New York Central Railroad, 347 I.C.C. 536 (1974). See also Milwaukee, slip op. at 16, discussing differing standards for motor and railroad employees due to more adaptable skills of motor carrier employees, citing American Bus Lines, Inc. v. United States, 253 F. Supp. 481 (D.D.C.), aff'd per curiam, 385 U.S. 38 (1966).

from the effects of the UP/MP/WP consolidation. Moreover, complainants have not demonstrated that the motor carriage performed by UPMF was limited to transportation that is auxiliary to rail movements and so intimately connected to UP's main transportation system so as to transform complainants into "railroad employees," as described in dicta in Cosby, 741 F.2d at 1080-81. Cf. Milwaukee, slip op. at 16-17.

Notwithstanding this conclusion, the Commission has discretionary authority under section 11344(c) to provide protection for motor carrier employees. There was, however, no request for protection by complainants or any other motor carrier employee during the UP-MP-WP proceeding. Also, there has been no showing, as there was in

Cosby, of pre-merger representations by management to complainants that might have deterred them from seeking protective conditions in the UP/MP/WP decision. On the contrary, UP management distinguished between protection for railroad craft union employees and "non-agreement" employees, with the latter eligible for only separation allowances if displaced by the transaction.

In Cosby, supra, the United States Court of Appeals for the Eighth Circuit stated that carrier employees of a wholly owned motor carrier subsidiary are entitled to the labor protection benefits required by section 11347. The court said that, even if the Commission had discretion to grant or deny protective conditions, it was an abuse of discretion given the facts

in that case not to grant the motor carrier employees the same level of protection granted applicant's railroad employees. The court cited a number of assurances made by officials of Burlington Northern to the effect that no employee would face involuntary unemployment as a result of the merger and statements to the effect that the operation of the motor carrier would not be changed. Especially relevant to the court in Cosby was the statement by C.M. Illg, Assistant Vice President-Labor Relations of BN, 741 F.2d at 1083:

> With the exception of clerical employees at Springfield, it is expected that the bulk of surplus employees created at any point and in any craft will be absorbed almost immediately on new positions and other vacancies caused by employees leaving service in the normal course of events... Those employees

> who do become surplus, or are displaced or are transferred due to the traction will be covered by protective benefits.

The Cosby court determined that this type of assurance gave the motor carrier employees no reason to seek to intervene in the merger proceeding, or to request their union to do so to protect or clarify management's intentions.

Such assurances were not made to UP/MP employees in this consolidation proceeding. The evidence presented in the UP/MP/WP proceeding by UP-MP clearly and consistently maintained that certain specified employees -- almost exclusively railroad craft union employees -- would receive the level of protection mandated in 49 U.S.C. 11347, while others would receive "severance benefits." Thus non-

railroad craft union employees were not misled by management assurances into refraining from seeking protection by participating in the merger proceeding.

The testimony of Philip A. Jordan, Vice President-Labor Relations and Personnel of UP is especially relevant.[7/] In his verified statement filed with the merger application, he consistently maintained that there would be a dichotomy of treatment with respect to labor protective conditions for affected employees. He maintained the distinction throughout his testimony between "agreement employees" (railway craft union) and "non-agreement employees" (others).

[7/] Verified Statement of Phillip A. Jordan in Finance Docket No. 30000, "Verified Statements of Applicants, Part I, Statements of Applicants' Officers in Support of Applications."

He stated:

> The principal adverse work force impact will be felt by non-agreement employees....
>
> In all instances non-agreement employees whose jobs are abolished will be given the opportunity to transfer to other positions without any reduction in salary level and will be reimbursed for moving expenses and any losses on the sale of their homes. Based on experience with past organizational changes involving nonagreement employees, we expect that most will desire to take advantage of this offer. For those for whom there is no other position available at their present location and who do not want to transfer, we will offer a separation allowance based on years of service up to one years' pay with a maximum of $35,000....
>
> Labor protection costs for non-agreement employees affected by the UPRR-MRRR and UPRR-WPRR consolidations were calculated using different assumptions reflecting different management policies. Affected UPRR-MPRR non-agreement employees

> were assumed to be absorbed by attrition during the first year after consolidation as they transferred to new job openings or elected a separation allowance. UPRR-WPRR non-agreement affected positions were assumed to be abolished promptly upon consummation, with incumbents accepting other non-agreement positions in the combined system or receiving a separation allowance.... (Emphasis added.)
>
> ....Non agreement employees whose positions are adversely affected will be given other job opportunities or a severance allowance.
> (Emphasis added.)

It is apparent that any employee who examined these statements would understand that a clear distinction was being made between the benefits of agreement employees and those of non-agreement employees. These distinctions are being made by the official in charge of labor relations-personnel for the

controlling carrier, and are distinctions widely understood by the unions, the railroad, and this Commission. Complainants, by examining this testimony and the common parlance of the industry, could assume that they were not "agreement employees," yet they or their union took no action to clarify or challenge management's position on the issue of severance benefits.

Certain assurances made by the merger applicants in UP/MP/WP also require review. On pages 189-90 of the application it is stated:

> Union Pacific Corporation, Pacific Rail System and Union Pacific Railroad do not intend to change the operations of Missouri Pacific Truck Lines. Rather, Missouri Pacific Truck Lines will continue to provide motor carrier service as a subsidiary of Missouri Pacific Railroad. Therefore, there will not be any effect on carrier

employees from approval of this application.

Viewed in the light least favorable to the merger applicants, this would appear to be an assurance that no MPTL employee would be affected by the merger. Taken in context of the other testimony presented in the proceeding, most notably Mr. Jordan's statement quoted above, this statement would appear at most to assure non-agreement motor carrier employee a severance package.[8/]

[8/] As discussed above (p. 7), there is no statutory requirement of protection for displaced motor carrier employees, unlike rail employees, but the Commission has discretion to impose protection for motor carrier employees, if requested. No request was made here. Even if such a request had been made, we would not have imposed more generous protections than the overall protection offered nonagreement employees here. See American Buslines, Inc. (discussed in n.6, supra) upholding "the customary protection in motor carrier cases of three months'

Because the motor carrier employees had adequate notice that the protective conditions required to be established for rail employees would not be established by the applicants for their benefit, and because the employees did not request the Commission to impose such conditions, we did not abuse our discretion under section 11344(c) by refraining from imposing protective conditions for the benefit of the motor carrier employees in UP/MP/WP. Complainants, who failed to participate in the merger proceeding, have shown no basis for reopening this long-closed proceeding, and only now imposing such protection along with the possibility of unforeseen obli-

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severance pay payable to the adversely affected employees." 253 F.Supp. 482-83.

gations on the merged carriers, under section 11344(c).[9/] Accordingly, we find Cosby not controlling.

This action will not significantly affect either the quality of the human environment or energy conservation.

It is ordered:

1. The request for labor protection filed by Marv Slusser, Gene Dudley, John A. Cameron, Tom Hampleman, Marv A. Seurer, R.D. Griffin, and Ronald D. Pester is denied.

2. The petition to reopen and request for enforcement filed by Louis C. Burris, Larry A. Creiger, David C. Doleshal, Steve Harter, Raymond May, Charles Payne, and

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9/ See Milwaukee, slip op. at 17; NS/NAVL, slip op. at 38, n. 46.

Charles F. Rivers II is denied.

3. In F.D. 30000 (Sub.No. 45), the motion to dismiss filed by defendants Union Pacific Motor Freight Company, Union Pacific Railroad Company, Missouri Pacific Railroad Company, and Missouri Pacific Truck Lines, Inc. is granted, the petition for extension of time is dismissed and the proceeding is dismissed.

4. This decision is effective on May 18, 1987.

By the Commission, Chairman Gradison, Vice Chairman Lamboley, Commissioners Sterrett, Andre, and Simmons. Vice Chairman Lamboley dissented in part with a separate expression.

(SEAL)

Noreta R. McGee
Secretary

VICE CHAIRMAN LAMBOLEY, dissenting in part:

I would reopen this proceeding and schedule an oral hearing to examine further the claims of the Kansas City complainants. In my view, they have made allegations and offers of proof of facts arguably sufficient to bring their complaint with the ambit of the holding of Cosby v. I.C.C., 741 F.2d 1077 (8th Cir. 1984), cert. denied, 105 S. Ct. 2344 (1985).

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 30000

UNION PACIFIC CORPORATION,
PACIFIC RAIL SYSTEM, INC.,
UNION PACIFIC RAILROAD COMPANY -
CONTROL - MISSOURI PACIFIC
CORPORATION AND MISSOURI
PACIFIC RAILROAD COMPANY

Finance Docket No. 30000
(Sub-No. 45)

GARY W. McPHERSON

v.

UNION PACIFIC MOTOR FREIGHT
COMPANY, ET AL.

Decided: April 12, 1989

By decision served August 17, 1987, we reopened these matters at the request of the Union Pacific parties (UP/MP)[1] to entertain evidence on limited issues concerning whether former employees of

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[1] Union Pacific Motor Freight Company, Union Pacific Railroad Company, Missouri Pacific Railroad Company, and Missouri Pacific Truck Lines, Inc.

the Union Pacific Motor Freight Company (UPMF) are entitled to labor protection.[2] Complainants[3] had earlier asked the Commission to find that its decision approving

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[2] Following a review of allegations by parties seeking judicial review, UP/MP concluded that the Commission's April 21, 1987 decision denying labor protection for some petitioners and refusing to reopen the matter for others reflected a misunderstanding of certain evidence regarding whether the motor carrier employees had sufficient notice of the consequences of UP Control and protections they might receive. UP/MP believed that other evidence should have been considered, and that the proceeding should be reopened.

[3] The Denver complainants are: Marvin Slusser; Gene Dudley; John A. Cameron; Tom Hampleman; Marv A. Seurer; R.D. Griffin; and Ronald D. Pester. The Kansas City complainants are: Louis C. Burris; Larry A. Creiger; David C. Doleshal; Steve Harter; Raymond May; Charles Payne; and Charles F. Rivers II. The Commission included Gary W. McPherson in the proceeding.

By pleading filed September 13, 1988, the parties advised us that complainants Burris, Creiger, Doleshal, Harter and Payne had entered into a settlement agreement with UP/MP, and withdrawn their

consolidation and imposing labor protective conditions in Union Pacific - Control-Missouri Pacific; Western Pacific, 366 I.C.C. 459 (1982) (UP Control) mandated benefits for adversely affected employees of motor carrier subsidiaries, as well as railroad employees of the Union Pacific Railroad Company (UP) and the Missouri Pacific Railroad Company.

In our August decision, we gave complainants an opportunity to demonstrate that they should receive labor protection under the mandatory standards set forth at 49 U.S.C. 11347, or in the exercise of the Commission's discretion under section 11344(c). They have demon-

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claims. By pleading filed November 9, 1988, the parties advised us that complainant May had entered into a settlement agreement with UP/MP, and withdrawn his claim.

strated neither. They presented no evidence or argument concerning our discretionary authority, although our August 17 decision specifically stated that we would entertain such a discussion. Instead, they sought (as they had earlier) to demonstrate that the Commission should find them qualified for mandatory labor protection under section 11347. They take the position that the decision of the court in Cosby v. ICC, 741 F.2d 1077 (8th Cir.), cert. denied, 471 U.S. 1110 (1984) (Cosby) requires us to conclude that motor carrier employees of railroad subsidiaries whose jobs may have been affected as a consequence of rail consolidations must be provided labor protection. As we have previously, we reject that

conclusion, and find that the complainants here are not entitled to labor protection.

The Cosby court, in considering claims for protective benefits from employees of a motor carrier subsidiary of a merged railroad, found that in the circumstances presented there the employees were entitled both to mandatory protection under section 11347 as railroad employees and to discretionary protection under section 11344. The Commission has consistently disagreed with Cosby to the extent it requires that labor protective benefits be awarded, because it does not reflect Commission precedent. We again reject Cosby's conclusion that motor carrier employees may be entitled to

labor protection under 49 U.S.C. 11347, and take this opportunity to explain our position.

Former section 5(2)(f) of the Interstate Commerce Act, the predecessor to section 11347, directed the Commission to "require a fair and equitable arrangement to protect the interests of the railroad employees affected" by consolidation. (Emphasis added.) Historically, the Commission interpreted this to mean that employees of non-rail subsidiaries were not entitled to mandatory labor protections. See Pennsylvania Railroad-Merger-New York Central Railroad, 347 I.C.C. 536 (1974) (Penn Central). The 1978 recodification of the Interstate Commerce Act requires the Commission to "provide a fair arrangement at least

as protective of the interests of employees who are affected by the transaction. . .". (Emphasis added.)

Language in the recodification clearly states that "Sections 1 and 2 of this Act [which includes section 11347] restate, without substantive change, laws enacted before May 16, 1978." Section 3(a) of Public Law 95-473, 92 Stat. 1466. (Emphasis added.) In Cass v. United States, 417 U.S. 72 (1974), the Supreme Court found that Congressional comments that there would be no substantive change, combined with the fact that no consideration of any change in the standards at issue appeared in the legislative history, conclusively demonstrated that no changes in the standards were contemplated by Congress when it made some changes in style and

form in the statute at issue there. In a case concerning the 1978 recodification at issue in the instant proceeding, the court stated that, where Congress had twice and without qualification stated that the recodification effects no substantive change in the prior law, the court must examine the language of the Interstate Commerce Act prior to recodification to determine the intent of Congress. Atchison, T. & S.F.Ry. Co. v. United States, 617 F.2d 485 (1980). Consequently we adhere to the view that 49 U.S.C. 11347 directs us to protect the interests of affected railroad employees, and not employees of non-rail subsidiaries. Penn Central, supra. The interpretation given to the recodification by the Cosby

court is inconsistent with the expressed intent of the Congress concerning the recodification.

Relying on that part of Cosby that focused on the type of work performed at the motor carrier (741 F.2d at 1080-81), complainants attempted to demonstrate that the work they did was "railroad" work, and that they consequently should be considered railroad employees for our purposes here. We find it difficult to determine the appropriate boundaries of "railroad" work (that is, deciding the nature of the tasks that might under Cosby bring non-railroad employees within section 11347 and qualify them for mandatory 6 year protection at their current wage level). We question whether Congress intended such a flexible interpretation of the

statute, particularly when it has supplied no guidelines for this task. Our conclusion in Penn Central, which we affirm, was that the identity of the employer was determinative as to who was entitled to mandatory labor protection.[4]

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[4] As we have discussed, Congress specified that mandatory protection was to be provided for "railroad employees," i.e., employees of railroads. We are simply assuming that Congress meeant what it said.

Consistent with the approach we are taking here, we have not in the past analyzed the nature of the work performed by those employed directly by a railroad. If affected, they are entitled to protection by virtue of their employment relationship and not because they perform so-called "railroad" work. See Finance Docket No. 21478 (Sub-No. 6), Great Northern Pacific & Burlington Lines, Inc. Merger - Great Northern Railroad (not printed), served December 11, 1986 (tax agent); Zinger v. Blanchette, 549 F.2d 901 (3d Cir. 1977) (eligibility of protection for attorney for railroad questioned because he was arguably a member of management but not because of nature of work).

Only individuals directly employed by a rail carrier are entitled to protection under section 11347. This excludes the complainants, who were employed by non-rail subsidiaries of the rail carrier.[5] This conclusion is consistent with our holdings in Milwaukee - Reorganization - Acquisition by GTC, 2 I.C.C.2d 427 (1985), and Norfolk Sourthern Corp. -- Control -- North American Van Lines, Inc., 1 I.C.C.2d 844 (1985), rev'd. on other grounds sub nom.

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[5] Our April 21, 1987 decision in this proceeding originally rejecting complainants' claims discussed the failure to demonstrate the work performed by UPMF was so intimately connected to UP's main transportation system so as to transform the complainants into railroad employees. As we indicated, this approach was described in Cosby at 1080-81. We adhere to the view that, whatever the nature of the work, the crucial test is the identity of the employer.

International Brotherhood of Teamsters v. ICC, 801 F.2d 143 (D.C. Cir. 1986), aff'd on rehearing, 818 F.2d 87 (D.C. Cir. 1987). In these cases we discussed (and rejected) arguments that petitioners performed rail-related work, but this does not mean that we were accepting Cosby's conclusion that section 11347 may require labor protection for employees of non-rail subsidiaries of the rail carrier. To adopt an approach requiring the Commission to examine each job performed in a non-rail subsidiary to determine whether it is the type of work that strikes us as being railroad work is both an unnecessary and undesirable role for the Commission to fashion for itself.

In the case noted above, we did consider Cosby's alternative discussion of our discretionary authority under section 11344(c), and found protection not to be justified. There is no need to discuss whether we should exercise our discretionary authority under 49 U.S.C. 11344(c) here because complainants did not address that issue, in spite of our invitation that they do so.

For all the foregoing reasons, we will deny complainants' request for labor protection under 49 U.S.C. 11347.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. Complainants' requests for labor protection are denied, and this proceeding is discontinued.

2. This decision will be effective on the date served.

By the Commission, Chairman Gradison, Vice Chairman Simmons, Commissioners Andre, Lamboley, and Phillips. Vice Chairman Simmons and Commissioner Lamboley dissented with separate expressions.

Noreta R. McGee

Secretary

(SEAL)

VICE CHAIRMAN SIMMONS, dissenting:

I disagree with the majority's refusal to consider and determine the facts and issues of this case under Cosby. When faced with the issue of whether employees of a motor carrier subsidiary of a merged

railroad are "railroad employees" for purposes of 49 U.S.C. 11347, I believe that the Commission must take into account the Cosby decision and not simply shrug it off. While we may view that decision as inconsistent with prevailing Commission precedent, it is, nevertheless, controlling and binding until otherwise reversed by the courts or legislation.

Given that, I agree that there may be instances when it might be difficult to determine what constitutes the boundaries of railroad work. However, for motor carrier employees involved directly and exclusively in TOFC/COFC operations, it is much easier to make a determination under Cosby where the court found persuasive the argument that those motor carrier operations

incidental to the parent railroad's operations may entitle the employees of the carrier to protections. This is because the Commission has already declared that railroad affiliated motor carrier operations involving the over-the-road portion of trailer-on-flatcars (TOFC) and container-on-flatcar (COFC) are services "related to a rail carrier." See Improvement of TOFC/COFC Regulations (Railroad-Affiliated Motor Carriers and Other Motor Carriers), 3 I.C.C. 2d 869 (1987). While that decision dealt with whether the rates of railroad affiliated motor carriers involved in TOFC/COFC operations should be exempt, the Commission had to first make a determination that the type of transportation provided by the motor carriers' affiliates is

"related to a rail carrier" under 49 U.S.C. 10505. It stands to reason then that if the nature of the transportation in which these employees were involved at the time of the merger are rail-related, they have met one Cosby requirement. On the other hand, I am not certain whether complainants have proven that they were persuaded by proper UP management that they would receive New York Dock and therefore, relying on such representations, did not assert their interests during the merger proceeding. It may be that both factors of Cosby must be present. Because of this, I would invoke Commission discretion, and leave this matter to arbitration. I would also leave open the question as to whether these particular employees were solely and

exclusively involved in TOFC operations and whether they were adversely affected as a result of the merger.

COMMISSIONER LAMBOLEY, dissenting:

Earlier, in this case as in others, I have dissented from the majority's rejection of the view, that in appropriate circumstances, employees of an integrated motor carrier subsidiary may be eligible for labor protection under provisions of § 11347.[1]

In my view, the majority's position runs contrary to statute and precedent.[2] Nothing in the

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[1] See, e.g., earlier dissent in FD No. 32000, Et Al., Rio Grande Industries, Inc., SPTC Holding, Inc., and The Denver and Rio Grande Western Railroad Company - Control - Southern Pacific Transportation Company, 4 I.C.C.2d 834, 974 (1988) (DRGW).

[2] See and compare 49 U.S.C. § 11347

legislative history limits or precludes eligibility for protections of persons employed by motor carriers providing services substantially integrated with and directly beneficial to the rail carrier activity involved in the subject transaction.

Heretofore, the Commission has declared that it has never specified the "class of employees" covered by its protective conditions, and has consistently declined to define "employee" on the ground that once the conditions have been imposed, the matter is for interpretation by the Courts, or resolution by

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with former § 5(2)(f) (49 U.S.C. § 5(2)(f). 49 U.S.C. § 11344(c) and Cosby v. I.C.C. 741 F.2d 1077 (8th Cir. 1984) cert. den. 471 U.S. 1110 (1984). But see Milwaukee Reorganization I, 2 I.C.C.2d 161 (1984) and II 2 I.C.C.2d 427 (1985), and DRGW, supra.

arbitration. Bell v. Western Maryland Ry. Co. 366 I.C.C. 64, 66-67 (1981).[3]

Accordingly, I fail to understand the relevancy of the majority's argument that determining whether employee activity is rail work "is both an unnecessary and undesirable role for the Commission to fashion for itself." There is neither reason nor need for the Commission to determine the parameters of such activity. Arbitration is a readily available and appropriate resolution for those fact-bound circumstances.

The present record evidences that Union Pacific Motor Freight Company (UPMF) was intimately and significantly tied to the railroad's

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[3] See also Chicago St. P M & O Ry Co. Lease 295 I.C.C. 441, 443 (1956).

main service functions as an integral part of the overall transportation system.[4] UPMF's primary role was to participate in the railroad's TOFC/COFC operations. In doing so, the petitioning employees, among other intermodal duties, operated rail equipment known as a "Piggy Packer" to off-load trailers from the flat cars. These operations are obviously directly rail-related for substantial and beneficial railroad purposes.

In general, I conclude that employees of motor carrier subsidiaries, who perform rail-related services substantially integrated with and directly beneficial to the

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[4] Indeed, the public reports of reason for UP acquisition of motor carrier, Overnite Transportation Co., reflect the railroad's desire to effectively and efficiently integrate intermodal subsidiaries.

rail carrier activity involved in the transaction subjected to conditions, may be considered eligible for coverage by the imposed conditions. In this particular case, I find that employees who directly and substantially perform rail-related services for an integrated motor carrier subsidiary operation may be eligible for protection to ameliorate adverse employment consequences of the 1982 merger transaction. Employment and causation questions concerning the nature and scope of employment activities as being directly and significantly rail-related, and whether the actions taken in Kansas City and Denver do, in fact, result from the merger, can, and should be resolved by an arbitration.[5]

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[5] Because I conclude protection is available under § 11347, I do not

Finally, the recent proceeding in FD No. 31423, Missouri Pacific Truck Lines, Inc. - Merger Exemption - Katy Transportation Co. (not printed), served March 17, 1989, (MoPac/Katy) deserves comment. In MoPac/Katy, the Commission, in exempting the merger of the motor carriers respectively owned by merging rail carriers, MoPac and Katy,[6] mandated protection for "railroad employees". Obviously, the Commission found a sufficient nexus of activity between the integrated motor carrier subsidiaries and the merged rail carrier for the purposes of

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reach the question of "discretionary imposition of conditions." See e.g., Walters v. Roadway Express, Inc. 557 F.2d 521 (5th Cir. 1977).

[6] See FD No. 30800, Union Pacific Corp. Et Al. - Control - Mo-Ks-Tx Co. Et Al. 4 I.C.C.2d 409 (1988) (UP/MKT).

protective conditions. A similar premise for protection of motor carrier employees may likewise exist in rail carrier merger proceedings.[7]

I fail to see a rational basis for distinguishing the grant of merger protection for "railroad" employees of integrated motor carrier subsidiaries, on the one hand, form the denial of protections for "other" employees of similarly integrated motor carriers who can demonstrate that they too perform substantial services directly realted and beneficial to the rail component in the merging transportation systems, on the

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[7] "Railroad employees" are not defined in the MoPac/Katy motor carrier decision. Protection was mandated for "rail employees" in the UP/MKT rail carrier case. Id. at 531.

other. It is the character of employment not the identity of the employer that I find determinative.

§ 11344. Consolidation, merger, and acquisition of control: general procedure and conditions of approval

(a) The Interstate Commerce Commission may begin a proceeding to approve and authorize a transaction referred to in section 11343 of this title [49 USCS § 11343] on application of the person seeking that authority. When an application is filed with the Commission, the Commission shall notify the chief executive officer of each State in which property of the carriers involved in the proposed transaction is located and shall notify those carriers. If a motor carrier providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title [49 USCS §§ 10521 et seq.] is involved in the transaction, the Commission must

notify the persons specified in section 10328(b) of this title [49 USCS § 10328(b)]. The Commission shall hold a public hearing when a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of that chapter [49 USCS §§ 10501 et seq.] is involved in the transaction unless the Commission determines that a public hearing is not necessary in the public interest.

(b)(1) In a proceeding under this section which involves the merger or control of at least two class I railroads, as defined by the Commission, the Commission shall consider at least the following:

(A) the effect of the proposed transaction on the adequacy of transportation to the public.

(B) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction.

(C) the total fixed charges that result from the proposed transaction.

(D) the interest of carrier employees affected by the proposed transaction.

(E) whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region.

(2) In a proceeding under this section which involves only carriers of passengers providing transportation subject to the juris-

diction of the Interstate Commerce Commission under subchapter II of chapter 105 of this title [49 USCS §§ 10521 et seq.], the Commissioner shall consider at least the following:

(A) the effect of the proposed transaction on the adequacy of transportation to the public.

(B) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction.

(C) the total fixed charges that result from the proposed transaction.

(D) the interest of carrier employees affected by the proposed transaction.

(c) The Commission shall approve and authorize a transaction under this section when it finds the transaction is consistent with the public interest. The Commission may impose conditions governing the transaction. When the transaction contemplates a guaranty or assumption of payment of dividends or of fixed charges or will result in an increase of total fixed charges, the Commission may approve and authorize the transaction only if it finds that the guaranty, assumption, or increase is consistent with the public interest. When a rail carrier, or a person controlled by or affiliated with a rail carrier, is an applicant and the transaction involves a motor carrier, the Commission may approve and authorize the transaction only

if it finds that the transaction is consistent with the public interest, will enable the rail carrier to use motor carrier transportation to public advantage in its operations, and will not unreasonably restrain competition. When a rail carrier is involved in the transaction, the Commission may require inclusion of other rail carriers located in the area involved in the transaction if they apply for inclusion and the Commission finds their inclusion to be consistent with the public interest. (Oct. 17, 1978, P.L. 95-473, § 1, 92 Stat. 1436.)

(d) In a proceeding under this section which does not involve the merger or control of at least two class I railroads, as defined by the

Commission, the Commission shall approve such an application unless it finds that-

(1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and

(2)the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.

In making such findings, the Commission shall, with respect to any application that is part of a plan or proposal developed under section 333(a)-(d) of this title [49 USCS § 333(a)-(d)], accord substantial weight to any re-

commendations of the Secretary of Transportation. The provisions of this subsection do not apply to any proceeding under this section which involves only carriers of passengers providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title [49 USCS §§ 10521 et seq.]

(e) A rail carrier, or a person controlled by or affiliated with a rail carrier, together with one or more affected shippers, may apply for approval under this subsection of a transaction for the purpose of providing motor carrier transportation prior or subsequent to rail transportation to serve inadequately served shippers located on a railroad other than the applicant carriers. Such application

shall be approved by the Commission if the applicants demonstrate presently impaired rail service and inadequate motor common carrier service which results in the serious failure of the rail carrier serving the shippers to meet the rail equipment or transportation schedules of shippers or seriously to fail otherwise to provide adequate normal rail services required by shippers and which shippers would reasonably expect the rail carrier to provide. The Commission shall approve or disapprove applications under this subsection within 30 days after receipt of such application. The Commission shall approve applications which are not protested

by interested parties within 30 days following receipt of such application.

(As amended Oct. 14, 1980, P.L. 96-448, Title II, § 228(a)-(c), 94 Stat. 1931; Sept. 20, 1982, P. L. 97-261, § 21(f), (g), 96 Stat. 1123; Feb. 14, 1984, P. L. 98-216, § 2(4), 98 Stat. 5.)

Section 11347 of the Interstate Commerce Act, 49 U.S.C. § 11347 (1982), provides:

When a rail carrier is involved in a transaction for which approval is sought under sections 11344 and 11345 or section 11346 of this title, the Interstate Commerce Commission shall require the carrier to provide a fair arrangement at least as protective of the interest of employees who are affected by the transaction as the terms imposed under this section before February 5, 1976, and the terms established under section 565 of title 45. Notwithstanding this subtitle, the arrangement may be made by the rail carrier and the authorized representative of its employees. The arrangement and the order approving the transaction must require that the employees of the

affected rail carrier will not be in a worse position related to their employment as a result of the transaction during the 4 years following the effective date of the final action of the Commission (or if an employee was employed for a lesser period of time by the carrier before the action became effective, for that lesser period).

LABOR PROTECTIVE CONDITIONS

In New York Dock Railway--Control--Brooklyn Eastern District, 360 I.C.C. 60, 84-90 (1979), the Commission set forth the following as the standard level of protection mandated by 49 U.S.C. § 11347 (1982):

Labor protective conditions to be imposed in railroad transactions pursuant to 49 U.S.C. 11343 et seq. [formerly sections 5(2) and 5(3) of the Interstate Commerce Act], except for trackage rights and lease proposals which are being considered elsewhere, are as follows:

1. Definitions.--(a) "Transaction" means any action taken pursuant to authorizations of this Commission on which these provisions have been imposed.

(b) "Displaced employee" means an employee of the railroad who, as a result of a transaction is placed in a worse position with respect to his compensation and rules governing his working conditions.

(c) "Dismissed employee" means an employee of the railroad who, as a result of a transaction is deprived of employment with the railroad because of the abolition of his position or the loss thereof as the result of the exercise of seniority rights by an employee whose position is abolished as a result of a transaction.

(d) "Protective period" means the period of time during which a displaced or dismissed employee is to be provided protection hereunder and extends from the date on which an employee is displaced or

dismissed to the expiration of 6 years therefrom, provided, however, that the protective period for any particular employee shall not continue for a longer period following the date he was displaced or dismissed than the period during which such employee was in the employ of the railroad prior to the date of his displacement or his dismissal. For purposes of this appendix, an employee's length of service shall be determined in accordance with the provisions of section 7(b) of the Washington Job Protection Agreement of May 1936.

2. The rates of pay, rules, working conditions and all collective bargaining and other rights, privileges and benefits (including continuation of pension rights and benefits) of the

railroad's employees under applicable laws and/or existing collective bargaining agreements or otherwise shall be preserved unless changed by future collective bargaining agreements or applicable statutes.

3. Nothing in this appendix shall be construed as depriving any employee of any rights or benefits or eliminating any obligations which such employee may have under any existing job security or other protective conditions or arrangements; provided, that if an employee otherwise is eligible for protection under both this appendix and some other job security or other protective conditions or arrangements, he shall elect between the benefits under this appendix and similar benefits under such other

arrangement and, for so long as he continues to receive such benefits under the provisions which he so elects, he shall not be entitled to the same type of benefit under the provisions which he does not so elect; provided further, that the benefits under this appendix, or any other arrangement, shall be construed to include the conditions, responsibilities and obligations accompanying such benefits; and, provided further, that after expiration of the period for which such employee is entitled to protection under the arrangement which he so elects, he may then be entitled to protection under the other arrangement for the remainder, if any, of this protective period under that arrangement.

4. Notice and agreement or decision.--(a) Each railroad contemplating a transaction which is subject to these conditions and may cause the dismissal or displacement of any employees, or rearrangement of forces, shall give at least ninety (90) days written notice of such intended transaction by posting a notice on bulletin boards convenient to the interested employees of the railroad and by sending registered mail notice to the representatives of such interested employees. Such notice shall contain a full and adequate statement of the proposed changes to be affected by such transaction, including an estimate of the number of employees of each class affected

by the intended changes. Prior to consummation the parties shall negotiate in the following manner.

Within five (5) days from the date of receipt of notice, at the request of either the railroad or representatives of such interested employees, a place shall be selected to hold negotiations for the purpose of reaching agreement with respect to application of the terms and conditions of this appendix, and these negotiations shall commence immediately thereafter and continue for at least thirty (30) days. Each transaction which may result in a dismissal or displacement of employees or rearrangement of forces, shall provide for the selection of forces from all employees involved on a basis accepted as appropriate for application in the particular

case and any assignment of employees made necessary by the transaction shall be made on the basis of an agreement or decision under this section 4. If at the end of thirty (30) days there is a failure to agree, either party to the dispute may submit it for adjustment in accordance with the following procedures:

(1) Within five (5) days from the request for arbitration the parties shall select a neutral referee and in the event they are unable to agree within said five (5) days upon the selection of said referee then the National Mediation Board shall immediately appoint a referee.

(2) No later than twenty (20) days after a referee has been designated a hearing on the dispute shall commence.

(3) The decision of the referee shall be final, binding and conclusive and shall be rendered within thirty (30) days from the commencement of the hearing of the dispute.

(4) The salary and expenses of the referee shall be borne equally by the parties to the proceeding; all other expenses shall be paid by the party incurring them.

(b) No change in operations, services, facilities, or equipment shall occur until after an agreement is reached or the decision of a referee has been rendered.

5. Displacement allowances.--(a) So long after a displaced employee's displacement as he is unable, in the normal exercise of his seniority rights under existing agreements, rules and practices, to obtain a position producing compensation equal to or exceeding the compensation he received in the position from which he was displaced, he shall, during his protective period, be paid a monthly displacement allowance equal to the difference between the monthly compensation received by him in the position in which he is retained and the average monthly compensation received by him in the position from which he was displaced.

Each displaced employee's displacement allowance shall be determined by dividing separately by

12 the total compensation received by the employee and the total time for which he was paid during the last 12 months in which he performed services immediately preceding the date of his displacement as a result of the transaction (thereby producing average monthly compensation and average monthly time paid for in the test period), and provided further, that such allowance shall also be adjusted to reflect subsequent general wage increases.

If a displaced employee's compensation in his retained position in any month is less in any month in which he performs work than the aforesaid average compensation (adjusted to reflect subsequent general wage increases) to which he would have been entitled, he shall

be paid the difference, less compensation for time lost on account of his voluntary absences to the extent that he is not available for service equivalent to his average monthly time during the test period, but if in his retained position he works in any month in excess of the aforesaid average monthly time paid for during the test period he shall be additionally compensated for such excess time at the rate of pay of the retained position.

(b) If a displaced employee fails to exercise his seniority rights to secure another position available to him which does not require a change in his place of residence, to which he is entitled under the working agreement and which carries a rate of pay and

compensation exceeding those of the position which he elects to retain, he shall thereafter be treated for the purposes of this section as occupying the position he elects to decline.

(c) The displacement allowance shall cease prior to the expiration of the protective period in the event of the displaced employee's resignation, death, retirement, or dismissal for justifiable cause.

6. Dismissal allowances.--(a) A dismissed employee shall be paid a monthly dismissal allowance, from the date he is deprived of employment and continuing during his protective period, equivalent to one-twelfth of the compensation received by him in the last 12 months of his employment in which he earned compensation prior to the

date he is first deprived of employment as a result of the transaction. Such allowance shall also be adjusted to reflect subsequent general wage increases.

(b) The dismissal allowance of any dismissed employee who returns to service with the railroad shall cease while he is so reemployed. During the time of such reemployment, he shall be entitled to protection in accordance with the provisions of section 5.

(c) The dismissal allowance of any dismissed employee who is otherwise employed shall be reduced to the extent that his combined monthly earnings in such other employment, any benefits received under any unemployment insurance law, and his dismissal allowance exceed the amount upon which his

dismissal allowance is based. Such employee, or his representative, and the railroad shall agree upon a procedure by which the railroad shall be currently informed of the earnings of such employee in employment other than with the railroad, and the benefits received.

(d) The dismissal allowance shall cease prior to the expiration of the protective period in the event of the employee's resignation, death, retirement, dismissal for justifiable cause under existing agreements, failure to return to service after being notified in accordance with the working agreement, failure without good cause to accept a comparable position which does not require a change in his place of residence for which he is qualified and eligible

after appropriate notification, if his return does not infringe upon the employment rights of other employees under a working agreement.

7. Separation allowance.--A dismissed employee entitled to protection under this appendix, may, at his option within 7 days of his dismissal, resign and (in lieu of all other benefits and protections provided in this appendix) accept a lump sum payment computed in accordance with section 9 of the Washington Job Protection Agreement of May 1936.

8. Fringe benefits.--No employee of the railroad who is affected by a transaction shall be deprived, during his protection period, of benefits attached to his previous employment, such as free transportation, hospitalization,

pensions, reliefs, et cetera, under the same conditions and so long as such benefits continue to be accorded to other employees of the railroad, in active or on furlough as the case may be, to the extent that such benefits can be so maintained under present authority of law or corporate action or through future authorization which may be obtained.

9. Moving expenses.--Any employee retained in the service of the railroad or who is later restored to service after being entitled to receive a dismissal allowance, and who is required to change the point of his employment as a result of the transaction, and who within his protective period is required to move his place of residence, shall be reimbursed for

all expenses of moving his household and other personal effects for the traveling expenses of himself and members of his family, including living expenses for himself and his family and for his own actual wage loss, not to exceed 3 working days, the exact extent of the responsibility of the railroad during the time necessary for such transfer and for reasonable time thereafter and the ways and means of transportation to be agreed upon in advance by the railroad and the affected employee or his representatives; provided, however, that changes in place of residence which are not a result of the transaction, shall not be considered to be within the purview of this section; provided further, that the railroad shall, to the same extent provided above, assume the

expenses, et cetera, for any employee furloughed within three (3) years after changing his point of employment as a result of a transaction, who elects to move his place of residence back to his original point of employment. No claim for reimbursement shall be paid under the provision of this section unless such claim is presented to railroad within 90 days after the date on which the expenses were incurred.

10. Should the railroad rearrange or adjust its forces in anticipation of a transaction with the purpose or effect of depriving an employee of benefits to which he otherwise would have become entitled under this appendix, this appendix will apply to such employee.

11. Arbitration of disputes.--(a) In the event the railroad and its employees or their authorized representatives cannot settle any dispute or controversy with respect to the interpretation, application or enforcement of any provision of this appendix, except sections 4 and 12 of this article I, within 20 days after the dispute arises, it may be referred by either party to an arbitration committee. Upon notice in writing served by one party on the other of intent by that party to refer a dispute or controversy to an arbitration committee, each party shall, within 10 days, select one member of the committee and the members thus chosen shall select a neutral member who shall serve as chairman. If any party fails to select its member of the arbitration

committee within the prescribed time limit, the general chairman of the involved labor organization or the highest officer designated by the railroads, as the case may be, shall be deemed the selected member and the committee shall then function and its decision shall have the same force and effect as though all parties had selected their members. Should the members be unable to agree upon the appointment of the neutral member within 10 days, the parties shall then within an additional 10 days endeavor to agree to a method by which a neutral member shall be appointed, and, failing such agreement, either party may request the National Mediation Board to designate within 10 days the neutral member whose designation will be binding, upon the parties.

(b) In the event a dispute involves more than one labor organization, each will be entitled to a representative on the arbitration committee, in which event the railroad will be entitled to appoint additional representatives so as to equal the number of labor organization representatives.

(c) The decision, by majority vote, of the arbitration committee shall be final, binding, and conclusive and shall be rendered within 45 days after the hearing of the dispute or controversy has been concluded and the record closed.

(d) The salaries and expenses of the neutral member shall be borne equally by the parties to the proceeding and all other expenses shall be paid by the party incurring them.

(e) In the event of any dispute as to whether or not a particular employee was affected by a transaction, it shall be his obligation to identify the transaction and specify the pertinent facts of that transaction relied upon. It shall then be the railroad's burden to prove that factors other than a transaction affected the employee.

12. Losses from home removal.--(a) The following conditions shall apply to the extent they are applicable in each instance to any employee who is retained in the service of the railroad (or who is later restored to service after being entitled to receive a dismissal allowance) who is required to change the point of his employment within his protective

period as a result of the transaction and is therefore required to move his place of residence:

(i) If the employee owns his own home in the locality from which he is required to move, he shall at his option be reimbursed by the railroad for any loss suffered in the sale of his home for less than its fair value. In each case the fair value of the home in question shall be determined as of a date sufficiently prior to the date of the transaction so as to be unaffected thereby. The railroad shall in each instance be afforded an opportunity to purchase the home at such fair value before it is sold by the employee to any other person.

(ii) If the employee is under a contract to purchase his home, the railroad shall protect him against

loss to the extent of the fair value of equity he may have in the home and in addition shall relieve him from any further obligation under his contract.

(iii) If the employee holds an unexpired lease of a dwelling occupied by him as his home, the railroad shall protect him from all loss and cost in securing the cancellation of said lease.

(b) Changes in place of residence which are not the result of a transaction shall not be considered to be within the purview of this section.

(c) No claim for loss shall be paid under the provisions of this section unless such claim is presented to the railroad within 1 year after the date the employee is required to move.

(d) Should a controversy arise in respect to the value of the home, the loss sustained in its sale, the loss under a contract for purchase, loss and cost in securing termination of a lease, or any other question in connection with these matters, it shall be decided through joint conference between the employee, or their representatives and the railroad. In the event they are unable to agree, the dispute or controversy may be referred by either party to a board of competent real estate appraisers, selected in the following manner. One to be selected by the representatives of the employees and one by the railroad, and these two, if unable to agree within 30 days upon a valuation, shall endeavor by agreement within 10 days thereafter

to select a third appraiser, or to agree to a method by which a third appraiser shall be selected, and failing such agreement, either party may request the National Mediation Board to designate within 10 days a third appraiser whose designation will be binding upon the parties. A decision of a majority of the appraisers shall be required and said decision shall be final and conclusive. The salary and expenses of the third or neutral appraiser, including the expenses of the appraisal board, shall be borne equally by the parties to the proceedings. All other expenses shall be paid by the party incurring them, including the compensation of the appraiser selected by such party.

ARTICLE II

1. Any employee who is terminated or furloughed as a result of a transaction shall, if he so requests, be granted priority of employment or reemployment to fill a position comparable to that which he held when his employment was terminated or he was furloughed, even though in a different craft or class, on the railroad which he is, or by training or retraining physically and mentally can become, qualified, not, however, in contravention of collective bargaining agreements relating thereto.

2. In the event such training or retraining is requested by such employee, the railroad shall provide for such training or retraining at no cost to the employee.

3. If such a terminated or furloughed employee who had made a request under section 1 or 2 of the article II fails without good cause within 10 calendar days to accept an offer of a position comparable to that which he held when terminated or furloughed for which he is qualified, or for which he has satisfactorily completed such training, he shall, effective at the expiration of such 10-day period, forfeit all rights and benefits under this appendix.

ARTICLE III

Subject to this appendix, as if employees of railroad, shall be employees, if affected by a transaction, of separately incorporated terminal companies which are owned (in whole or in part) or used by railroad and employees of any

other enterprises within the definition of common carrier by railroad in section 1(3) of part I of the Interstate Commerce Act, as amended, in which railroad has an interest, to which railroad provides facilities, or with which railroad contracts for use of facilities, or the facilities of which railroad otherwise uses; except that the provisions of this appendix shall be suspended with respect to each such employee until and unless he applies for employment with each owning carrier and each using carrier; provided that said carriers shall establish one convenient central location for each terminal or other enterprises for receipt of one such application which will be effective as to all said carriers and railroad shall notify such employees of this

requirement and of the location for receipt of the application. Such employees shall not be entitled to any of the benefits of this appendix in the case of failure, without good cause, to accept comparable employment, which does not require a change in place of residence, under the same conditions as apply to other employees under this appendix, with any carrier for which application for employment has been made in accordance with this section.

ARTICLE IV

Employees of the railroad who are not represented by labor organization shall be afforded substantially the same levels of protection as are afforded to members of labor organizations under these terms and conditions.

In the event any dispute or controversy arises between the railroad and an employee not represented by a labor organization with respect to the interpretation, application or enforcement of any provision hereof which cannot be settled by the parties within 30 days after the dispute arises, either party may refer the dispute to arbitration.

ARTICLE V

1. It is the intent of this appendix to provide employee protections which are not less than the benefits established under 49 U.S.C. 11347 before February 5, 1976, and under section 565 of title 45. In so doing, changes in wording and organization from arrangements earlier developed under those sections have been necessary to make

such benefits applicable to transactions as defined in article I of this appendix. In making such changes, it is not the intent of this appendix to diminish such benefits. Thus, the terms of this appendix are to be resolved in favor of this intent to provide employee protections and benefits no less than those established under 49 U.S.C. 11347 before February 5, 1976 and under section 565 of title 45.

2. In the event any provision of this appendix is held to be invalid or otherwise unenforceable under applicable law, the remaining provisions of this appendix shall not be affected.

STATUTES

Section 5(2)(c) of the Interstate Commerce Act, 49 U.S.C. § 5(2)(c) (1976), provides:

(c) In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

Section 5(2)(f) of the Interstate Commerce Act, 49 U.S.C. § 5(2)(f) (1976), provides:

(f) As a condition of its approval, under this paragraph or paragraph (3), of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment except

that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Such arrangement shall contain provisions no less protective of the interests of employees than those imposed before February 5, 1976, pursuant to this subdivision and those established pursuant to section 565 of Title 45. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may be entered into after September 18, 1940, by any carrier or carriers by railroad and the duly

authorized representative or representatives of its or their employees.